

Acquisition Advisory Panel

REVISED TO SHOW STATUS BASED ON 1/31 DELIBERATIONS

Cross-Cutting Issues: Small Business Working Group Preliminary Draft Recommendations

January 31, 2006

**REVISED TO SHOW STATUS BASED ON 1/31
DELIBERATIONS.**

Small Business Working Group Panel Members

- **David Javdan, Chair**
 - General Counsel, U.S. Small Business Administration
- **Louis Addeo**
 - President, AT&T Government Solutions
- **Deidre Lee**
 - Assistant Commissioner for Integrated Technology Services, Federal Acquisition Service, GSA
- **Roger Waldron**
 - Acting Senior Procurement Executive, GSA

General Issue Areas Analyzed

- Adequacy of guidance in structuring federal services acquisitions to afford small business participation on the prime contracting level
- Adequacy of guidance to ensure that small businesses have fair access to competition for multiple award prime contracts and task orders

Finding #1

- **Contracting officers need definitive guidance on the priority for applying the various small business contracting preferences to particular acquisitions**

Recommendation #1

- **Amend the Small Business Act to provide consistent statutory language governing the applicability of the various small business preference programs**
- ***Panel Adopted on 1/31/06 Subject to Technical Review of Language***

Proposed Amendment Under Recommendation #1

- Amend 15 U.S.C. § 657a(b)(2) to resolve any confusion and to ensure that contracting officers have the discretion to award HUBZone set aside and sole source awards:
 - (2) Authority of contracting officer
~~Notwithstanding any other provision of law--~~
 - (A) a **A** contracting officer may award sole source contracts under this section to any qualified HUBZone small business concern, if--
* * * * *
 - (B) a **A** contract opportunity shall **may** be awarded pursuant to this section on the basis of competition restricted to qualified HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price; and

Finding #2

- Contracting officers need explicit guidance on how to exercise their discretion in selecting the appropriate small business contracting method for a procurement

Recommendation #2

- Provide guidance clarifying that contracting officer discretion in selecting small business contracting methods should be based on small business goal achievements and market research
- *Panel Adopted on 1/31/06 Subject to Technical Review of Language*

Proposed Amendments Under Recommendation #2

- Delete 48 C.F.R. § 19.800 (e):
~~Before deciding to set aside an acquisition in accordance with subpart 19.5 [small businesses], 19.13 [HZ], or 19.14 [SDVO] the contracting officer should review the acquisition for offering under the 8(a) Program. If the acquisition is offered to the SBA, SBA regulations (13 C.F.R. § 126.607(b)) give first priority to HUBZone 8(a) concerns.~~
- Amend 13 C.F.R. § 124.504(j) as follows:
The contracting officer should **shall** consider setting-aside the requirement for HUBZone, 8(a), or SDVO SBC participation before considering setting aside the requirement as a small business set-aside.

Proposed Amendments Under Recommendation #2 (Con't)

- Amend 13 C.F.R. § 125.19(b) to read as follows:

If the contracting officer determines that §125.18 does not apply, the contracting officer ***shall*** should consider setting aside the requirement for 8(a), HUBZone, or SDVO SBC participation before considering setting aside the requirement as a small business set-aside.

- Amend 13 C.F.R. § 126.607(b) to read as follows:

If the contracting officer determines that §126.605 does not apply, the contracting officer shall ***consider setting*** aside the requirement for HUBZone, 8(a), or SDVO SBC contracting before setting aside the requirement as a small business set-aside.

Proposed Amendments Under Recommendation #2 (Con't)

- Delete 13 C.F.R. §126.609:

~~If a contract opportunity for competition among qualified HUBZone SBCs does not exist under the provisions of §126.607, the contracting officer must first consider the possibility of making an award to a qualified HUBZone SBC on a sole source basis, and then to a small business under small business set-aside procedures, in that order of precedence. If the criteria are not met for any of these special contracting authorities, then the contracting officer may solicit the procurement through another appropriate contracting method.~~

Finding #3

- Agencies need accurate, real-time FPDS-NG data to assess small business goal achievements

Recommendation #3

- Direct GAO to conduct a review to determine the accuracy and timeliness of FPDS-NG data
- *Tabled for Reconsideration at a Later Time*

Finding #4

- **Cascading procurements fail to balance the Government's interest in quick contracting with the requirement for the maximum practicable small business contracting opportunities**

Recommendation #4

- **Amend governing statutes and regulations to expressly preclude cascading procurements as an acquisition strategy**
- ***Panel Adopted on 1/31/06 Subject to Technical Review of Language***

Proposed Amendments Under Recommendation # 4

- Add a new paragraph (l) to 10 U.S.C. § 2304 as follows:

(l) The Secretary of Defense shall prescribe guidance for the military departments and the Defense Agencies prohibiting the use of a tiered evaluation of an offer for a contract or for a task or delivery order under a contract.

- Add a new paragraph (j) to 41 U.S.C. § 253 as follows:

(j) The Federal Acquisition Regulation shall prescribe guidance for the executive agencies prohibiting the use of a tiered evaluation of an offer for a contract or for a task or delivery order under a contract.

Finding #5

- The contracting community does not properly apply and follow the governing contract bundling definition and requirements in planning acquisitions

Recommendation #5

- Provide additional training and create an interagency group to develop best practices and strategies to unbundle contracts and mitigate the effects of contract bundling
- *Panel Adopted on 1/31/06 Subject to Technical Review of Language*

Finding #6

- **The Government needs more data on contract bundling to be able to assess and quantify its impact on small businesses**

Recommendation #6

- **Revise the FPDS-NG data fields to allow for the collection of specified information concerning contract bundling**
- *Tabled for Reconsideration at a Later Time*

Proposed Amendment Under Recommendation # 6

- Require that two data fields be added to FPDS-NG for contracting activities to report:
 1. The number of small business contracts that were displaced by the bundled action; and
 2. The projected cost savings of the bundled action.

Finding #7

- **Agency officials need targeted training to better acquaint them with the requirements and benefits of contracting with small businesses**

Recommendation #7

- **Require that OFPP coordinate the development of a government-wide training module on small business contracting and subcontracting with small businesses**
- ***Panel Adopted on 1/31/06 Subject to Technical Review of Language***

Finding #8

- The strategy of reserving prime contract awards for small businesses in full and open multiple award procurements may be effective in providing small business prime contracting opportunities

Recommendation #8

- Provide express statutory authorization for small business reservations of prime contract awards in full and open multiple award procurements that are not suitable for competition exclusively by small businesses
- *Panel Adopted on 1/31/06 but implementing language is remanded back to working group for additional work to consider Panel discussions*

Proposed Amendment Under Recommendation # 8

- Amend 10 U.S.C. § 2304a(d)(3) and 41 U.S.C. § 253h(d)(3) to add new paragraphs (C) and (D) to read as follows:

(3) The regulations implementing this subsection shall –

(C) establish criteria for setting aside multiple award contracts for small business concerns, including the subcategories of small business concerns identified in Section 15(g)(2) of the Small Business Act (15 U.S.C. 644(g)(2)); and

(D) establish criteria for reserving one or more contract awards for small business concerns under full and open multiple award procurements, including the subcategories of small business concerns identified in Section 15(g)(2) of the Small Business Act (15 U.S.C. 644(g)(2)), when a total set aside is not appropriate.

Finding #9

- **Contracting officials need guidance on how to apply the limitations on subcontracting requirements to small business prime contract reservations in full and open multiple award vehicles**

Recommendation #9

- **Provide a statutory and regulatory amendment to clarify that the limitations on subcontracting provisions do not apply to contracts that are reserved for small businesses in full and open multiple award procurements**
- ***Withdrawn by Working Group Chair for resubmission with additional language***

Proposed Amendments Under Recommendation # 9

- Add a new paragraph (4) to 15 U.S.C. § 644(o) to read as follows:

(4) The limitations on subcontracting do not apply to prime contracts that are reserved for small business concerns under full and open multiple award procurements.

Add a new paragraph (k) to 13 C.F.R. § 125.6 as follows:

(k) The limitations on subcontracting do not apply to prime contracts that are reserved for small business concerns under full and open multiple award procurements.

Finding #10

- The contracting community needs explicit guidance on utilizing small business reservations for orders against multiple award IDIQ contracts

Recommendation #10

- Provide a statutory and regulatory amendment granting agencies explicit discretion to limit competition for orders to small businesses
- *Panel Adopted on 1/31/06 but implementing language is remanded back to working group for additional work to consider Panel discussions.*

Proposed Amendments Under Recommendation #10

- Amend 10 U.S.C. § 2304c and 41 U.S.C. § 253j, governing FAR Part 16 IDIQ Contracts, to redesignate paragraphs (c), (d), (e) and (f) as paragraphs (d), (e), (f) and (g) and to include a new paragraph (c) as follows:

(c) Notwithstanding any other provision of law, including but not limited to paragraph (b) and Section 803 of Pub. Law No. 107-107, 115 Stat. 1012 (2002), a contracting officer has the discretion to set forth procedures in multiple award contracts that provide that competition for particular orders may be limited to small business concerns, including the subgroups identified in Section 15(g)(2) of the Small Business Act (15 U.S.C. 644(g)(2)).

Proposed Amendments Under Recommendation #10 (Con't)

- Amend FAR § 16.504 as follows:

(4) A solicitation and contract for an indefinite quantity must—

(iv) State the procedures that the Government will use in issuing orders, including the ordering media, and, if multiple awards may be made, state the procedures and selection criteria that the Government will use to provide awardees a fair opportunity to be considered for each order (see 16.505(b)(1)) ***and state whether competition for particular orders may be limited based on socio-economic status;***

Proposed Amendments Under Recommendation #10 (Con't)

- Amend FAR § 16.505 as follows:

(iii) The contracting officer should consider the following when developing the procedures:

(6) Whether competition for orders will be limited based on socio-economic status.

Proposed Amendments Under Recommendation #10 (Con't)

- Amend DFAR § 216.505-70 as follows:
 - (c) An order for services exceeding \$100,000 is placed on a competitive basis only if the contracting officer--

 - (2) (i) Provides a fair notice of the intent to make the purchase, including a description of the work the contractor shall perform and the basis upon which the contracting officer will make the selection, to all small business contractors offering the required services under the multiple award contract; and***
 - (ii) Affords all small business contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered.***

Proposed Amendments Under Recommendation #10 (Con't)

- Amend FAR § 8.405-5, governing the Multiple Award Schedule (MAS) orders as follows:

(b) Ordering activities may consider socio-economic status when identifying contractor(s) for consideration or competition for award of an order or BPA.

(1) Ordering activities may, in their sole discretion, explicitly limit competition for an order to small business concerns, including veteran-owned small business, service disabled veteran-owned small business, HUBZone small business, women-owned small business, or small disadvantaged business schedule contractor(s). Ordering activities must comply with all applicable competition requirements when utilizing this authority.

Proposed Amendments Under Recommendation #10 (Con't)

- Amend FAR § 8.405-2(d), governing the MAS orders as follows:

(d) *Evaluation*. The ordering activity shall evaluate all responses received using the evaluation criteria provided to the schedule contractors (***unless competition was limited based on socio-economic status (see 8.405-5(b)(1))*** * * * *)

Proposed Amendments Under Recommendation #10 (Con't)

- Amend DFAR § 208.404-70, governing the MAS orders as follows:

(c) An order for services exceeding \$100,000 is placed on a competitive basis only if the contracting officer provides a fair notice of the intent to make the purchase, including a description of the work the contractor shall perform and the basis upon which the contracting officer will make the selection, to--

(2) As many small business schedule contractors as practicable, consistent with market research appropriate under the circumstances, and the contracting officer receives offers from at least three small business schedule contractors that can fulfill the work requirements; or
